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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 28

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION,
Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY.

PETITION FOR REHEARING

The petitioner, Transportation-Communication Employees Union ("TCU"), prays that this Court grant rehearing of its order of December 5, 1966, remanding the case to the District Court with directions to that court to remand the dispute to the National Railroad Adjustment Board for further proceedings.

REASONS FOR GRANTING REHEARING

I. The Jurisdiction of the National Railroad Adjustment Board With Respect To Work Assignment Disputes Is Left Uncertain By the Court

In presenting their arguments before this Court, with respect to the jurisdiction of the Adjustment Board in the area of work assignment disputes, the positions taken by TCU and by the respondent Carrier

were diametrically opposite. TCU contended that the jurisdiction of the Adjustment Board is limited to determining claims between carriers and employees whether one of the parties to a collective bargaining agreement has violated that agreement and that the Adjustment Board does not have jurisdiction to determine disputes as to which of two groups of employees is entitled to the assignment of performing particular work.

The Carrier on the other hand, took the position that the Adjustment Board does have jurisdiction to determine which group of employees is entitled to perform disputed work, and that the Adjustment Board does not have jurisdiction to determine that the Carrier had entered into separate lawful agreements with two labor organizations assigning the same work to two groups of employees and to provide a remedy for both groups.

There is, however, a third possibility with respect to the jurisdiction of the Adjustment Board in this area which, although not urged by either of the parties, appears to be the view of the Court. This possibility is that the Adjustment Board has jurisdiction to determine, and must determine, two issues in claims involving such disputes. First, the Adjustment Board must determine which group of employees is entitled to the assignment of the work in dispute. Second, having determined which group of employees is entitled to perform the disputed work, the Adjustment Board then must determine whether the agreement between the carrier and the labor organization representing employees to whom the work is not assigned, obligates the carrier to pay such other employees.

The majority of the Court appears to adopt this third possibility. Thus, the Court states (Opinion of the Court, p. 5):

> "Here, though two jobs existed when the collective bargaining agreements were made and though the railroad properly could contract with one union to perform one job and the other union to perform the other, automation has now resulted in there being only one job, a job which is different from either of the former two jobs and which was not expressly contracted to either of the unions. *Although only one union can be assigned this new job, it may be that the railroad's agreement with the nonassigned union obligates the railroad to pay it for idleness attributable to such automation job-elimination. But this does not mean that* both unions can, under their separate agreements, have the right to perform the new job or that *the Board, once the dispute has been submitted to it, can postpone determining which union has the right to the job in the future.*" (Emphasis added.)

The Court's statement appears to fault the Adjustment Board's determination of TCU's claim, not because the Adjustment Board did not have jurisdiction to determine whether the agreement between the Carrier and TCU obligated the Carrier *to pay* employees represented by TCU whether or not they performed the disputed work, but only because the Adjustment Board failed *also* to determine, in the same proceeding, which group of employees was entitled *to perform* the work in dispute, thus "postpon[ing] determining which union has the right to the job in the future."

The dissenting opinion, however, beclouds the matter. Thus, the dissenting opinion states (Dissenting Opinion, pp. 12-13):

> *"The Court today rules that* whatever the collective bargaining agreements provide—regardless of their provisions, and of the understanding of the parties—*the Board* must award the disputed work to one union or the other, and that it *cannot provide a remedy to members of both, even if their contracts should so demand."* (Emphasis added.)

A clarification of the Court's opinion with respect to the jurisdiction of the Adjustment Board in the area of this kind of disputes, an area in which the Adjustment Board has not heretofore trod, is necessary to enable the parties subject to the Railway Labor Act to be aware of their rights under the Act, and to enable the Adjustment Board to perform correctly its statutory duties.

II. We Respectfully Submit That the Court Erred in Directing the District Court To Remand the Dispute To the National Railroad Adjustment Board.

This Court affirmed the decision of the Court of Appeals that the Clerks' union should be a party before the Adjustment Board, but, instead of setting aside the order of the Adjustment Board as did the Court of Appeals, it remanded the cause to the District Court with directions to remand the case to the Adjustment Board for further proceedings. Such remand, however, is contrary to the express terms of the Railway Labor Act.

Footnote 4 of the Court's opinion (Opinion of the Court, p. 9) sets forth the basis of the Court's decision to remand the case. The Court notes that at the time the case was pending before the Court below,

> "the Court of Appeals had no alternative but to affirm the dismissal by the District Court, for district courts could only 'enforce or set aside' the

> Board's orders under § 3 First (p). They could not remand cases to the Board. This was changed on June 20, 1966, by Pub. L. No. 89-456, § 2(e), 80 Stat. 208, which inserted a new provision, § 3 First (q), empowering district courts to remand proceedings to the Board."

The Court's reliance upon the 1966 amendments to the Railway Labor Act in remanding the case to the Adjustment Board, however, is misplaced. Section 3, First (q), as amended on June 20, 1966, is a new provision of the Act pursuant to which a party aggrieved by the failure of the Adjustment Board to make an award, or aggrieved by any of the terms of the award or by the failure of the division to include certain terms in such award is permitted to petition the District Court for review of the Adjustment Board's order. In considering such petition for review, the District Court is given jurisdiction,

> "*to affirm the order* of the division or to *set it aside,* in whole or in part, *or* it may *remand the proceeding* to the division for such further action as it may direct." (Emphasis added.)

The suit in the present case, however, was not instituted to *review* an order of the Adjustment Board, but rather, to *enforce* an order of the Adjustment Board. The exclusive provision of the Act dealing with enforcement suits (except for time limits) is still Section 3, First (p). The jurisdiction of the District Court in enforcement suits, with respect to the disposition it can make of such suits, was not affected by the 1966 amendments to the Railway Labor Act except that the grounds upon which an award may be set aside were restricted. Section 3, First (p) provides:

> "*The district courts are empowered,* under the rules of the court governing actions at law, to

make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate *to enforce or set aside the order* of the division of the Adjustment Board." (Emphasis added.)

Accordingly, the courts are not empowered to remand a case in a suit to enforce an order of the Adjustment Board. In the present case, therefore, the Court had power only to set aside the award and order and could not remand the case to the Adjustment Board.

The District Court dismissed the complaint for lack of an indispensable party in the court proceedings. The Court of Appeals affirmed. The correct disposition now, if the Court adheres to its decision notwithstanding Point III of this Petition, is a remand to the District Court with directions to set aside the award and order of the Adjustment Board in conformity with Section 3, First (p) of the Railway Labor Act.

The posture of the dispute upon the setting aside of the award and order, is that the dispute would remain open and pending before the Adjustment Board awaiting performance by the Board of its statutory duty to make a valid award and order disposing of it. *Brotherhood of Railroad Trainmen* v. *Swan,* 214 F. 2d 56 (7th Cir. 1954.)

III. The Court Should Reconsider the Issue of Whether the National Railroad Adjustment Board Is An Appropriate Tribunal To Exercise the Jurisdiction the Court Has Conferred Upon It In Light of the Due Process of Law Requirements of the Constitution

The Adjustment Board is a bipartisan organization composed of an equal number of labor organizations' representatives and carriers' representatives. (Section 3, First (a), 45 U.S.C. § 153, First (a).) An

additional and neutral member of the Adjustment Board is appointed only when there is a deadlock among the partisan members and hence inability to reach a majority decision of a dispute before it. (Section 3, First (l) and (n), 45 U.S.C. § 153, First (l) and (n).)

The composition of the Adjustment Board is such that it cannot afford a group of employees, claiming that a carrier should have assigned certain work to them, with the requisite fair hearing. Neither the majority nor concurring opinions of the Court discuss this issue. Although the dissenting opinion does note the inequitable result that could emerge because of the "peculiar" composition of the Adjustment Board (Dissenting Opinion, page 11, footnote 8), it too fails to recognize the due process issue involved.

The denial of due process which will result if the Adjustment Board has the jurisdiction conferred upon it by the Court, is patent in this case. Thus, in the present case, TCU would be required to bring its claim before the Adjustment Board, Third Division. This division consists of ten members, five of whom represent the interests of the Carrier who already has determined the work assignment dispute in favor of another group of employees not represented by TCU, and a sixth member, who was chosen to serve as a representative on the Adjustment Board by a labor organization representing the group of employees to whom the work was assigned. TCU would, accordingly, be compelled to progress its claim before a tribunal of ten members, six of whom have an interest in the controversy adverse to the claimant. Almost certainly those six members would make the decision and a referee would never participate, as the Court appar-

ently assumed he would. Such a proceeding could not possibly meet the due process requirements of the Constitution. Cf. *Tumey* v. *Ohio,* 273 U.S. 510 (1927); *In Re Murchison,* 349 U.S. 133 (1955); *Hornsby* v. *Dobard,* 291 F. 2d 483, 487 (5th Cir. 1961); *Edwards* v. *Capital Airlines,* 176 F. 2d 755, 760-761 (D.C. Cir. 1949); *Brady* v. *Trans World Airlines,* 167 F. Supp. 469, 472 (D. Del., 1958).

CONCLUSION

For the reasons set forth above, it is respectfully urged that rehearing be granted.

Respectfully submitted,

MILTON KRAMER
LESTER P. SCHOENE
MARTIN W. FINGERHUT
Counsel for Petitioner

SCHOENE AND KRAMER
1625 K Street, N.W.
Washington, D.C. 20006

Certificate

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

LESTER P. SCHOENE
Counsel for Petitioner

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